

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD
SPECIAL CIVIL APPLICATION No. 1239 of 2007

For Approval and Signature:

HONOURABLE MR.JUSTICE DN PATEL

=====

1 Whether Reporters of Local Papers may be
allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the
fair copy of the judgment ?

4 Whether this case involves a substantial
question of law as to the interpretation
of the constitution of India, 1950 or any
order made thereunder ?

5 Whether it is to be circulated to the
civil judge ?

=====

RABIABEN HARUNBAHI MEMON

Versus

MEMON YUSUFBHAI HAJI IBRAHIM EBANI.AND ANR.

=====

Appearance :

MR SHAKEEL A QURESHI for Petitioner:1

MS TANUJA KACHCHHI AGP for Respondent:2

=====

CORAM : HONOURABLE MR.JUSTICE DN PATEL

Date : 09/08/2007

ORAL JUDGMENT

1. The present Special Civil Application has been preferred against the order dated 13th November, 2006 passed by the learned Principal Senior Civil Judge, Veraval whereby, an application bearing Civil Misc.Application No.1 of 2005 was dismissed. The said application was for restoration of an application bearing Civil Misc.Application No.42 of 2001 (it was an application preferred for allowing institution of suit by present petitioner as an indigent person under Order XXXIII) which was dismissed for default because of absentism of the original plaintiff vide order dated 15th December, 2004. Thus, the suit was dismissed on 15th December, 2004. Immediately thereafter an application was preferred for restoration on 5th January, 2005 which has also been dismissed and, therefore, the present petition has been preferred by the original plaintiff.
2. Having heard the learned counsel for the petitioner and for the respondent no.2 and looking to the facts and circumstances of the case, the order passed by the learned Principal Senior Civil Judge, Verval dated 13th November, 2006 in Civil Misc.Application

No.1 of 2005 is hereby quashed and set aside and the Civil Misc.Application No.42 of 2001 is hereby restored mainly for the following facts and reasons.

2.1 It appears, from the facts of the case, that the present petitioner had preferred an application bearing Civil Misc. Application No.42 of 2001 when she was not able to make payment towards court fees in a suit for specific performance she applied so as to allow institution of suit as indigent person. This application bearing no.42 of 2001 was preferred on 15th September, 2001. Thereafter an affidavit for examination-in-chief was also given under Order 18 Rule IV of Code of Civil Procedure, 1908, but thereafter looking to the application, it appears that the present petitioner (original plaintiff) was sick and therefore, unable to remain present in the Court. Because of her absentism, the said application bearing Civil Misc.Application No.42 of 2001 was dismissed for default for want of prosecution on 15th December, 2004.

2.2 Immediately i.e. within period of 30 days, an application was preferred for restoration of the said application. This application for restoration

was given on 15th January, 2005 bearing Civil Misc.Application No.1 of 2005. The reasons for restoration of the Civil Misc.Application No.42 of 2001 have been given.

2.3 It appears from the facts of the case that because of sickness, original plaintiff could not remained present before the Court. This aspect of the matter has not been controverted by anybody nor it is reflected in the order dated 13th November, 2006 passed by the Trial Court because of the sickness the original plaintiff could not remain present. The respondent no.1 though is issued notice by this Court has refused to accept the service of notice and affidavit to that effect has also been filed by the present petitioner (original plaintiff). Thus, the ground upon which restoration application was preferred is also not controverted before this Court.

2.4 The respondent no.1 has not remained present before this Court.

3. In view of the aforesaid facts and reasons, the order dated 13th November, 2006 passed by the learned

Principal Senior Civil Judge, Veraval in Civil Misc.APplication No.1 of 2005 is hereby quashed and set aside. Civil Misc.Application No.42 of 2001 is hereby restored.

4. It is assured by the learned counsel appearing for the petitioner that now she will remain present before the trial Court, either person or through her lawyer.

5. Rule is made absolute. Direct Service is permitted.

(D.N.PATEL, J.)

Amit/-